IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. ———.

MISSOURI PACIFIC TRANSPORTATION COMPANY,

and

COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK, NEW JERSEY, INTERVENOR, *Petitioners*,

v.

J. C. GEORGE, J. H. LOOKADOO and G. W. LOOKADOO, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13, 1935, and Rule 38, subdivision 1 of this Court. Petitioners assert that their federal rights were invaded by both the United States District Court for the Eastern District of Arkansas by the decree rendered in that court and its affirmance by the United States Circuit

Court of Appeals for the Eighth Circuit, and that petitioners are entitled to invoke the judgment of this Honorable Court for relief.

ADDITIONAL STATEMENT OF FACTS.

Under the heading "Short Statement of the Facts" in the petition, a brief review has been given of the facts pertinent to the points relied upon for issuance of the writ, which statement is now referred to and adopted as a part of this brief.

It will be seen by reference to the second amended complaint (R. 43, also printed as Appendix D hereto) that the federal suit was based upon recitals that plaintiffs had newly discovered that the key witness John Smith had been promised $500.00 for testifying falsely that he had seen the alleged accident, and that fraud and duress exercised upon Claud Denson had caused him to perjure himself at the hearing upon motion for a new trial. The following additional facts regarding witness Denson appear undisputed in the record:

Mr. J. H. Lookadoo knew, at the time he sent for Claud Denson to come back from Oregon, the contents of the affidavit Claud Denson had made. (R. 145 *et seq.*) Mr. G. W. Lookadoo was advised of the contents of the affidavit Claud Denson had made contending the purported accident of J. C. George was false and simulated at the time he drove the father of Claud Denson to DeQueen, Arkansas, and then, accompanied by a deputy sheriff, went to the home of Claud Bailey, where Claud Denson was contacted by his father. (R. 173) Forrest Denson was advised of the contents of the affidavit Claud Denson had made at the time he accompanied Mr. G. W. Lookadoo to DeQueen, Arkansas, for the purpose of advising him that unless Claud Denson changed his statement, they would be sent to the penitentiary. (R. 80, *et seq.*) A felony charge had been lodged against Forrest Denson at the time. (R. 80 *et seq.*) G. W. Lookadoo and Forrest Denson did secure the services of a

deputy sheriff at DeQueen, Arkansas, preparatory to going and interviewing Claud Denson. (R. 84) The deputy sheriff, Mr. Manning, accompanied Mr. Lookadoo and Forrest Denson to the home of Claud Bailey, where Claud Denson was interviewed, and was introduced to Claud Denson as a deputy sheriff. (R. 85) Forrest Denson advised his son, Claud Denson, that unless he changed his statement and testified favorably to J. C. George, he would be sent to the penitentiary and Claud Denson would go back to the reformatory. (R. 85-86) This admission is also made by Claud Denson. (R. 131) To the same effect is the testimony of Mrs. Annie Bailey, (R. 102) Claud Bailey admitted (R. 132):

> "My dad told mother he wanted to bring me back to Arkansas and she told him she did not want me to come and my dad said I had to go or both of us would go to the pen. And my mother said I would not have to go if I just told the truth. But dad thought I did. On that occasion my mother and I cried and I was excited. I did not want to go back to the pen or have to go there. I would not have went to Arkadelphia and made the statement I did make but for the things that were said to me and in my presence on that occasion. I certainly would not have done it. The statement I made to the bus company people was true. I still say it is true. I testified later at a motion for new trial or rehearing or new trial. I testified that the statement I had given the transportation company was not true because of what they told me, that I would have to go back to the penitentiary. I was afraid for dad, too. I have always lived with my father except this one trip. The relationship between me and my father has always been friendly all the way through. Me and my father had always been close."

Under these circumstances Claud Denson, who was visiting with his mother at the home of his aunt, Mrs. Bailey, near DeQueen, Arkansas, entered an automobile with his father, Forrest Denson, one of the defendants, Mr. G. W. Lookadoo, and a deputy sheriff, Mr. Manning. He rode

from the home of Mr. Teeter a few miles across the line in the state of Oklahoma over to Arkadelphia, Arkansas, and was taken to the office of J. H. Lookadoo, where a statement was dictated by J. H. Lookadoo in the presence of Forrest Denson. Claud Denson signed the statement. He was a lad then sixteen or seventeen years old and remained in the custody of his father for a day or two until he was placed upon the witness stand to testify on the motion for new trial. Forrest Denson further admitted (R. 178):

> "I recall having come to the office of Mr. Lookadoo in company with Mr. Terrell. I recall what the purpose was of going to the office. They brought me up there to try to get me to change the statement. I do remember the conversation which took place in the office, in which I said—well, I just told them I wasn't going to change it, I told them I wasn't going to change the statement, that I was telling the truth. J. H. Lookadoo, General (G. W. Lookadoo) and Mr. Terrell was present then."

It is true Mr. G. W. Lookadoo and Mr. J. H. Lookadoo testified that they never told Claud Denson to say anything but the truth. They do not dispute nor deny, however, that the threats and duress hereinabove set forth occurred and no witness denies or disputes the testimony that the threats were made and that the threats, duress and fraud so established was responsible for Claud Denson's conduct.

EXCERPTS FROM MAJORITY AND DISSENTING OPINIONS IN THE SUPREME COURT OF ARKANSAS.

Petitioners have endeavored to state here only those facts directly supporting the points relied upon for allowance of the writ; the following excerpts from the majority and dissenting opinions in the Supreme Court of Arkansas, where the judges were compelled to study the entire voluminous record, furnish a background against which the facts pertinent here show up more clearly.

Opinion of Majority, Supreme Court of Arkansas.

"In this case if we were triers of facts we might believe appellee to be a chronic plaintiff seeking by devious ways and methods to extort by 'hand-made' processes money from those with whom he came in contact, and although we might feel that the verdict is contrary to preponderance of the evidence, yet we are powerless in the face of this constitutional provision (of Arkansas) as construed throughout the years to enter that field so peculiarly belonging to the jury."

Dissenting Opinion of Chief Justice Griffin Smith, Concurred in by McHenry and Holt, J. J.

"Aside from inconsequential testimony the jury's verdict, in respect of appellant's negligence and consequent liability, rests entirely upon the testimony of appellee—the vitally interested party who asked that he be compensated to the extent of $50,000, and who has recovered $15,000. True, the witness, Smith, made certain statements; but, on cross-examination, he admitted that he was not in a position to see the transaction. What he says, therefore, is of but slight importance. The bolstering potentiality of his words is of no more significance than would be the voice of a stranger crying in the wilderness of would-be helpfulness. * * *

"This brings us to a discussion of the credibility to be given appellee's testimony. * * *

"We have, then, the situation of an interested witness who has impeached himself—a witness whose objective was to recover $50,000, * * *

"Against appellee's own repeated declarations of injury in 1929, against his assertions of aggravation in 1933, against the testimony of competent and disinterested witnesses who negative the accusation of negligence upon appellant's part, against Dr. McClain's testimony that appellee, when attended at the hotel immediately after the incident, 'Smelled pretty strong of whiskey, talked a little like a drunk man, and had all the movements of a drunk man'; against Dr. McClain's statement that appellee, when driven home, got out of the car unaided and walked up an

embankment to his home—in utter disregard of everything suggested by reason and common sense in connection with the affair—we, as members of the appellate court, recline supinely behind a judicial dogma and permit a scandalous miscarriage of justice to be consummated by virtue of a jury's apparent acceptation of testimony so glaringly insufficient as to shock the sensibilities of thinking people. * * *

"The writer of this opinion adheres to the view (presented by a philosophy often discussed but seldom analyzed) that human rights are paramount to property rights; and in litigation where these rights are in conflict, sympathy for the so-called 'underdog' invariably suggests restitution or compensation in favor of the plaintiff where a doubt exists as to relative issues. This adherence to a philosophy of right, however, does not go to the extent of sanctioning perjury and wrecking the rules by which society is maintained in order that one who suddenly finds himself in misfortune may place his hands in the pocket of another and help himself to the abundance he conceives to be deposited there."

SPECIFICATIONS OF ERROR.

Petitioners respectfully refer to "Points Relied upon for Allowance of Writ" petition, *supra*, page 6, and adopt each of the grounds there stated as a specification of error which justifies issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit and requires reversal of the judgment of the United States District Court for the Eastern Distict of Arkansas, Little Rock Division.

ARGUMENT.

Petitioners Were Entitled to Trial by Jury, as a Matter of Right, Under the Seventh Amendment.

Prior to adoption of the new Federal Rules of Civil Procedure petitioners could not have demanded in either the state or federal court, money damages for the fraud perpetrated upon them and in the same proceeding have obtained relief by enjoining the successful litigants in the

state court from executing upon the judgment obtained. Two separate and independent suits would have had to have been filed and maintained. *Scott* v. *Neely*, 140 U. S. 106, *American Mills Co.* v. *Surety Co.*, 260 U. S. 360, 364; *American Soda Fountain Co.* v. *Futrall* (Supreme Court of Arkansas), 84 S. W. 505. Section 6292, Crawford and Moses Digest of Statutes of Arkansas.

By Rule 18 of the Rules of Civil Procedure, effective September 16, 1938, a plaintiff is permitted to join in his complaint "either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." Pursuant thereto, in the second amended complaint filed in the instant cause July 15, 1940, plaintiffs prayed for an injunction restraining defendants from levying or executing upon the judgment of the state court, and, in the alternative prayed a money judgment against the defendants in "the sum of $15,000.00, together with regular interest thereon from November 11, 1938, and for costs in the cause of J. C. George v. Missouri Pacific Transportation Company, rendered by the Circuit Court of Clark County, Arkansas."

Plaintiffs' second amended complaint in the federal suit alleged evidence newly discovered since denial of its motion for new trial in the state court to the effect that the key witness John Smith had been promised payment for testifying falsely at the original trial, and that upon the motion for new trial, the witness Claude Denson had been threatened and coerced into giving perjured testimony which resulted in dismissal of the motion.

Had this complaint contained only the prayer for money damages, could there be any doubt but that plaintiffs would have been entitled to a trial by jury under the Seventh Amendment? Petitioners think not, and deem it unnecessary to cite authorities. Did they, then, forfeit their right to trial by jury because under the new Rules they joined their request for money damages with a request for equitable relief?

In *Scott* v. *Neely,* 140 U. S. 106, the question arose under a statute of Mississippi authorizing a bill in equity to subject property of a defendant to a lien and payment of a contract debt prior to proceedings at law to establish the validity and amount of the debt, whether such an action could be maintained in the federal courts. This Court held that while the equitable right created by the state statute could be enforced in the federal courts, such enforcement could not impair the right conferred by the Seventh Amendment to trial by jury—

> "The Constitution, in its Seventh Amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings to the end that the right to trial by jury in the legal action may be preserved intact."

See also *American Mills Co.* v. *Surety Co.,* 260 U. S. 360; *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121; *Pacific Indemnity Co.* v. *McDonald,* 25 F. Supp. 21.

In *Pacific Indemnity Co.* v. *McDonald, supra,* where the Court upheld the right to trial by jury in a declaratory judgment proceeding, where there were mixed questions of law and fact, the Court said—

> "In this particular hour of challenge to Democratic institutions abroad and of little faith by many in our own country in the forms and processes of Democracy, American courts should not hesitate to re-declare their faith in the jury system.
>
> "As we contemplate the brutalities of despotic power arbitrarily exercised in other lands, we can well say with Blackstone, that the right to jury trial is the

glory of our law, as the great Commentator felt it to be the glory of the English law."

Rule 38 of the Rules of Civil Procedure was apparently framed to meet the exigencies of the principle announced in *Scott* v. *Neely*, for it announces that the right of trial by jury "shall be preserved to the parties inviolate," and provides that "any party may demand a trial by jury of any issue triable of right by a jury".

It is submitted that the provisions of Rule 38(b) with respect to the right to demand jury trial "of any issue" was worded so as not to conflict with Rule 18, which permits joinder of legal and equitable claims.

The Request for Jury Trial was Timely Served.

Rule 38(b) of the Rules of Civil Procedure, reads as follows:

> "(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

The record shows that the second amended complaint, filed July 15, 1940, set up new matter and presented issues of fraud regarding witness John Smith, the facts with respect to which were unknown to plaintiffs at the time the original complaint was filed. The answer of defendants to this complaint was not filed until July 16, 1940 (R. 25, 29) and hence plaintiffs under the Rule had until July 26th to make their request. One would naturally infer, however, that where trial intervenes in less than ten days after the last pleading directed to the jury issue, demand would have to be made at some time prior to the trial. In this case the first demand was made July 11, 1940 (R. 52) and

renewed on July 15. (R. 52, 53) The record affirmatively shows that the request for trial by jury was renewed in open court prior to the hearing on July 16, 1940, when defendants' counsel were present. (R. 78, 79) It will be recalled that the District Court judge based his ruling denying jury trial upon a theory that the equitable issues prevented the right from attaching, for the courts order shows the following entry:

> "Also there is presented to the court the motion and demand of the Commercial Casualty and Insurance Co. and Missouri Pacific Transportation Co. for trial by jury, which motion and demand for trial by jury were by the court overruled and denied, pending decision upon the equitable issues involved and presented in these proceedings. To which action of the court the plaintiff and the intervenor saved exceptions."

It is common knowledge that the New Rules of Civil Procedure are not perfect and do not purport to cover every contingency. Rule 38 if given too strict interpretation would frequently deprive litigants of their constitutional right under the Seventh Amendment, and the courts have given recognition to this fact. Under the circumstances of this case, it would be trivial to deprive plaintiffs of their constitutional right to a trial by jury on the ground that they had waived the right through not complying with the letter of Rule 38 regarding service, when the record so clearly shows that the opposing attorneys did have notice of the demand, heard the demand made in open court, and made no point at any time that they did not have actual notice that jury trial had been demanded.

It was in the Circuit Court of Appeals that the suggestion was made for the first time that the record did not sufficiently show service of the demand for jury trial.

The Complaint Raised Issue of Extrinsic Fraud Requiring Upon Demand, Trial by Jury.

In a case of this kind the relief sought does not act upon the court rendering the judgment; that is, the state court,

but the relief is against the party obtaining the judgment and preventing him from enjoying the fruits of same. (Cf. *Marshall* v. *Holmes*, 141 U. S. 589, 35 L. Ed. 870; *Arrowsmith* v. *Gleeson*, 129 U. S. 86, 32 L. Ed. 630; *McDaniel* v. *Traylor*, 196 U. S. 415, 49 L. Ed. 533; *Simon* v. *Southern Railroad Company*, 236 U. S. 115, 51 L. Ed. 492; *Chi. Ry. & P. R. Co.* v. *Callicotte*, 267 Fed. 797, 16 A. L. R. 386, petition for writ of certiorari denied by the Supreme Court of the United States March 7, 1921, 41 S. Ct. 375)

Under the provisions of the statutes of the State of Arkansas, a judgment obtained by extrinsic fraud can only be attacked by an independent suit to vacate or modify the judgment. (See Section 6292, *Crawford & Moses Digest of the Statutes of Arkansas.*)

The facts pleaded and proved disclose extrinsic fraud in that it was fraud practiced outside of an actual, adversary trial, upon a witness of the adverse party, whereby the Missouri Pacific Transportation Company was prevented from presenting fully and fairly its side of the case. (See cases above cited.)

The Honorable Circuit Court of Appeals wrote:

> "Were the judgment appealed from based solely on the plea of res judicata, it is possible that the court erred."

This suit was filed June 21, 1940. Show cause ordered issued for June 21, 1940. The respondents, defendants below, filed and the court sustained their plea of res judicata on the 21st day of June, 1940. (R. 29.) This was the sole ground upon which the court dismissed the bill of complaint. On the 25th day of June, 1940, the trial court filed its findings of fact and conclusions of law (R. 30 *et seq.*), in which the court dealt only with the facts relative to the plea of res judicata and concluded as a matter of law that the bill should be dismissed upon the sole ground of sustaining said plea. Objections were filed by applicant (R. 34) that no testimony was heard upon which the court could base findings of fact and conclusions of law. Appeal

was taken (R. 36) to the Honorable United States Circuit Court of Appeals for the Eighth Circuit. Reversal was had and mandate issued on July 10, 1940. (R. 38.) Since the court had sustained the plea of res judicata without the hearing of testimony, the cause was immediately set for July 16, 1940, and the same plea was again presented, and the court after hearing testimony on the plea of res judicata again sustained said plea. (R. 59-64.) It is true that after the court heard the evidence offered in support of the plea of res judicata, he then permitted other testimony bearing upon the merits, whereupon he sustained the plea and dismissed the bill. While the trial court went through the gesture of sitting through testimony it would seem clear that it gave no real consideration to the merits, even though its order disposed of the issues on the merits as well as sustaining the plea.

The Circuit Court of Appeals found that the record does not disclose service of demand for jury trial, in compliance with Rule 38. The brief was filed below and there was no contest on the point that it was asserted that demand was made on the 11th day of July, 1940, and that after the court had granted the application of Commercial Casualty Insurance Company of Newark, New Jersey, to intervene and that after Missouri Pacific Transportation Company was granted leave to and did file its amended pleading, application was made and service then and there had for jury trial, which the court did not grant; and that after the court heard the testimony upon the plea of res judicata on the 16th day of July, 1940, application for jury trial was renewed and by the court refused, and while, due to inadvertence of counsel in preserving the record we are unable to point out service in the Transcript, we do find that it was recognized by the court, as disclosed by the record, page 78, when the request for jury trial was renewed on July 16, 1940, and on page 79 of the Transcript, when the court stated,

"The motion will be overruled as heretofore stated. Proceed with the testimony."

Wherefore, petitioners pray that this petition for writ of certiorari be granted and that this Honorable Court proceed as required by law and the rules of the court in such cases, and that upon final hearing, the said judgment of the United States District Court for the Eastern District of Arkansas, Little Rock Division, and of the United States Circuit Court of Appeals for the Eighth Circuit be reversed, and this court remand the cause to the proper court with proper and appropriate instructions.

MISSOURI PACIFIC TRANSPORTATION COMPANY AND COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK, NEW JERSEY,

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